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Recent Cases

CONFLICT OF LAWS—VALIDITY OF CONTRACT—LAW WHICH GOVERNS

*Schaposchnikoff v. De Gheest's Estate*¹

Mrs. De Gheest was an elderly American citizen residing in Paris during and after World War II. She was possessed of rich resources in the United States, but as life was very "dear" in occupied France, she became in great need of money for living in Paris. The plaintiff, Schaposchnikoff, loaned her francs and valuables in February, preceding the liberation of Paris by allied forces. In exchange for the francs and valuables Mrs. De Gheest executed a written assignment, a *reconnaissance de dette*, for \$28,000 of funds, securities, and credits belonging to her in the possession of the Mercantile Commerce Bank and Trust Company of St. Louis, Missouri. The instrument recited that "whereas, said May Eunice Scullin De Gheest has been unable to reimburse said sum owing to the blocking of funds belonging to her situated in the U. S. . . . the said May Eunice Scullin De Gheest, hereby does assign, transfer, and set over unto said Alexandre Schaposchnikoff, the sum of twenty eight thousand dollars. . . ." There were German and French decrees prohibiting exchange operations in foreign currency. The money was never transferred by the Mercantile Commerce Bank and Trust Co., prior to Mrs. De Gheest's death, and the plaintiff filed a claim in the Probate Court of the City of St. Louis founded on an account for money had and received by decedent from the claimant and introduced the assignment as evidence of the debt. The primary defense of the executor was that the transaction out of which the claim arose was wholly illegal and void under the law of France, and hence under accepted principles of conflict of laws the claim was unenforceable in Missouri. The lower court excluded evidence of the defendant to the effect that the transaction was illegal under the law of France and gave a judgement for \$28,000 plus interest to the plaintiff. The defendant appealed contending that the lower court erred in excluding the evidence because (1) the law of Missouri is that the law of the place of making the contract governs the essential validity of the contract; (2) even if the law of Missouri is that the law of the place of performance governs the contract, it does not apply here since the transaction was made and completely performed in France, and thus the action of the plaintiff was not an action upon a contract but an action for money had and received or for breach of warranty implied in the assignment; and (3) if the court still finds the transaction valid and enforceable, the plaintiff can only recover the number of francs loaned, converted into dollars at the time of the judgment.

The Missouri Supreme Court, speaking through Barrett, C., accepted the defendant's offer of proof that the transaction was illegal and void under the French law (although it was not too clear what French law the defendant was offering to prove) and held that the plaintiff could nevertheless recover on his claim in Missouri. In so doing the court necessarily came to grips with the troublesome question:

1. 243 S.W. 2d 83 (1951).

What is the conflicts rule in Missouri as to the law governing the contract? The second contention of the defendant was struck down by the court on the ground that the action was not based on the assignment; "that regardless of the true nature of the action," the whole transaction was just a loan since the assignment itself recited that it was executed with a view to the repayment of the sum advanced. The action was in *indebitatus assumpsit* to recover for money had and received. The court rejected the third contention of the defendant, pointing out that this was not an obligation to pay francs but an obligation to pay dollars of an amount stipulated in the *reconnaissance de dette*. Thus the difficulty involved in rendering a judgment in dollars on an obligation to pay francs was not encountered. The court then proceeded to determine which law governed the essential validity of the transaction. By the law of France the transaction was illegal and void; by the local law of Missouri the transaction was valid and enforceable.

In reviewing the Missouri cases, the court encountered what it considered an "irreconcilable conflict." Cases were referred to as holding that the *lex loci contractus* governs the validity of the contract.² Others were cited as holding that the law of the place of performance governs.³ These cases were dismissed with the state-

2. State of Kansas *ex rel.* Winkle Terra Cotta Co. v. U. S. Fidelity & Guaranty Co., 322 Mo. 121, 14 S.W. 2d 576 (1928); Ruhe v. Buck, 124 Mo. 178, 27 S.W. 412, 25 L.R.A. 178 (1894); Cravens v. New York Life Ins. Co., 148 Mo. 583, 50 S.W. 519, 53 L.R.A. 205 (1899); Kelsall v. Riss & Co., 165 S.W., 2d 329 (Mo. App. 1942). In the Winkle case the defendant contended that the State of Kansas could not maintain the action on a contract made in Kansas, since the Kansas law which governed the contract was that no private person was authorized to use the name of the state to prosecute an action for his own benefit. The court was not called upon to decide which law tested the validity of the contract but just which law governed the form of the remedy. In deciding that the *lex fori* governs the form of the remedy, the court said, "In Ruhe v. Buck, 124 Mo. 178, 183, 27 S.W. 412 (25 L.R.A. 178, 46 Am. St. Rep. 439) Judge Gantt quoted approvingly from Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245, as follows: 'Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. . . . Matters respecting the remedy, such as bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.' " The Ruhe case involved the validity of an attachment of property in Missouri of a married woman who contracted the debt out of which the attachment arose in Dakota. By the law of Missouri at that time the contracts of a married woman were void. The court quoted the language used by the U. S. Supreme Court in the Scudder case but the real basis of the decision was that a non-resident creditor could not proceed against a married woman by attachment since he is entitled to such remedies only as the *lex fori* affords. The place of performance of the contract was not considered. The statement in the Kelsall case that the law of the place of contract governs the contract was also dictum as a Missouri statute stipulated that the Missouri Workmen's compensation act was to apply unless the contract of employment otherwise provided. The Cravens case can be harmonized with the intent theory. There the insurance company by policy provisions sought to have the law of New York govern the transaction. The court held that the contract was a Missouri contract and thus governed by the Missouri law. As the court said, the case was decided "principally because of the state's expressed statutory policy."

3. Smoot v. Judd, 161 Mo. 673, 61 S.W. 854 (1901); Davis, McDonald & Davis v. Tandy 107 Mo. App. 437, 81 S.W. 457 (1904); Odell & Frink v. Gray & Co., 15 Mo. 337 (1951). The Davis case recognizes the intention theory. The court said, "The

ment "that it would serve no useful purpose" to attempt an analysis and reconciliation of them. It was observed that in most of the cases the pronouncement that the *lex loci contractus* governed the contract was mere dictum as they were cases in which the contracts were made and to be performed in the same state. A reading of the past Missouri decisions reveals that the Missouri courts, as well as courts of other jurisdictions, have been very careless in the use of their language. Whether the court is applying the *lex loci contractus*, the law of the place of performance, or the law intended by the parties is often a very difficult matter to determine, since the law intended by the parties is nearly always either the *lex loci contractus* or the law of the place of performance. Some cases say that they are applying the *lex loci contractus* and at the same time refer to the intent theory.⁴

Upon looking at the law of other jurisdictions and the books and articles of the specialists in the conflicts field, the court found the same general conflict to exist. Three views are recognized: (1) that the *lex loci contractus* governs;⁵ (2) that the law of the place of performance governs, and (3) that the law intended by the parties governs.⁶ The present decision definitely rejects the inflexible rule that the *lex loci contractus* governs, championed by Professor Beale and the *Restatement of Conflicts*. The second rule was not applied as the court recognized that final payment was contemplated in Paris.⁷ The court expressed favor with the views advanced by Professor Cook,⁸ who advocates the intention of the parties theory on the ground that it affords a degree of flexibility which enables the courts to give "different types of social, economic, and business problems" a needed, separate consideration. Naturally if such a rule is to be accepted, it must be harnessed with reasonable limitations.⁹ No court would suggest that the parties are free in all cases

rule is, that the law of the place of performance (that is, in this case, the place where the note was to be paid), governs the contract. . . . But such rule of law gives way to the will of the contracting parties. If the parties stipulated either that the law of the place of performance, or the law of the place where made, shall govern, effect should be given to their will . . . and in instances as in this case where there is no express stipulation by the parties as to which law should govern, it will be presumed that they intended that law which recognizes such contacts to be valid, and not the law which would render them invalid."

4. Nussbaum, *Conflict Theories of Contracts; Cases Versus Restatement*, 51 YALE L. J. 893 (1942).

5. RESTATEMENT, CONFLICT OF LAWS § 332 (1934); 2 BEALE, CONFLICT OF LAWS § 332.4 (1935); GOODRICH, CONFLICT OF LAWS § 110 (1949).

6. Cook, *Contracts and the Conflict of Laws*, 32 ILL. L. REV. 899 (1938); Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L. J. 565, 655 (1921); Nussbaum, *supra* note 3.

7. "No doubt, as the executor points out, in the normal course of events, had Mrs. De Gheest lived and had the assignment been honored the loan would have been repaid through a transfer of credits, the last one to Mr. Schaposchnikoff in Paris. Pages 90, 91.

8. Cook, *supra* note 5; Vennum v. Mertens, 119 Mo. App. 461, 95 S.W. 292 (1906).

9. In Bundy v. Commercial Credit Co., 200 N. C. 511, 157 S.E. 860 (1931), it was held that a stipulation in a contract of loan made in Maryland, that its validity, enforcement, interpretation, construction, and effect should be governed by the law of Delaware, or that the parties ever contemplated either the making

to choose the law of any country they please, although some of the cases contain language broad enough to be so construed. According to Professor Cook the choice of the parties is limited to that country with which the contract has some "substantial connection." With this in mind the court proceeded to point out the connections which the contract had with this country and with Missouri. Mrs. De Gheest was a citizen of the United States; the parties contracted with reference to the funds of the Merchantile Commerce Bank and Trust Co. of St. Louis, Missouri; the advice of an American lawyer in Paris was sought; and "as events have transpired" the connection was made even stronger.

It is to be noted that in the principal case there was no express provision as to what was to be the applicable law; however, there is evidence from which the court could infer that the parties actually intended the local law of Missouri to apply. The act of seeking the advice of an American lawyer who informed them that he considered such an arrangement valid in this country is some evidence that the parties intended the local Missouri law to apply instead of the law of France, particularly so when such a transaction was prohibited by German and French decrees. It has been held that there is a presumption where the parties do not expressly stipulate as to which law is to govern that they intended the law which recognizes their contract as valid and not the law which would render their contract invalid.¹⁰

The *Restatement, Conflict of Laws*, Section 347, states: "The law of the place of contracting determines whether a promise is void . . . for illegality. . . ." Professor Nussbaum who is a strong advocate of the intent theory would accept Section 347 as a limitation upon the intent theory. He believes that it is "sound policy for the local courts ordinarily to hold a contract invalid where it is invalidated because illegal by the *lex loci contractus*."¹¹ Such a limitation is not considered by the court in the principal case. The court cites *Holland Furnace Co. v. Connelley*,¹² which was heavily relied upon by the lower court, as authority for the decision. The *Holland* case involved an application of the full faith and credit clause of the United States Constitution¹³ which is not pertinent in the principal case since the transaction occurred in a foreign country and not in another state. In the *Holland* case it was held that even if the contract was made in Michigan where the contract was declared by statute to be illegal and void, the contract was still enforceable under

or the performance of the contract in that state. See 112 A.L.R. 124 for a collection of cases holding to the effect that the parties can not arbitrarily select the law of a jurisdiction which has "no real connection" with the contract.

10. *Davis, McDonald & Davis v. Tandy*, 107 Mo. App. 437, 81 S.W. 457 (1904); *J. I. Case Threshing Machine Co. v. Tomlin*, 174 Mo. App. 512, 161 S.W. 286 (1913).

11. Nussbaum, *supra* note 3 at 908 and notes 93 and 94, where he expresses the view that his line of thought probably dissents from that suggested by Professor Cook. In *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551 (1904), it was said by way of dictum, "Parties contracting outside of the State of New York may by agreement incorporate into the contract the laws of that state and make its provisions controlling upon both parties, provided such provisions do not conflict, with the law or public policy of the state in which the contract is made. . . ."

12. 48 F. Supp. 543 (E.D. Mo. 1942).

13. U. S. Const. Art. IV, § 1.

the law of Missouri where the public policy is to enforce such contracts. Judge Collet in applying the intent theory to the contract there involved cited the Missouri cases following the intent theory and pointed out that what is so often stated to be an irreconcilable conflict might not be a conflict at all. The court said, "The apparent conflict between the doctrine that the law of the place where the contract is made will control and the rule that the law of the place of performance will govern is in reality no conflict at all. The apparent inconsistency results from the unexpressed application of a more fundamental controlling principal."

The principal case is not founded on the ground that the public policy of Missouri is contrary to that of France, although the court indicates that French laws would not be enforced in Missouri if they were contrary to the public policy of the United States and of Missouri. It is, however, emphasized that the Missouri public policy does not "militate" against the validity of the plaintiff's claim. The basis of the decision seems to be that the Missouri law applies solely because it is the law intended by the parties to apply. The selection by the parties controls since Missouri had a "sufficient number of points of contact" with the transaction, and it is not necessary to invoke a "contrary to the public policy of Missouri" argument to support the choice of the parties as to the applicable law. As Professor Cook puts it, "There is no substantial reason why a state with which the transaction has a sufficient number of points of contact would not give effect to it, even though by the 'law of the place of contracting' it is legally ineffective."¹⁴

RICHARD H. ICHORD

CONTRACTS—PRESUMPTION PERSONAL SERVICES GRATUITOUS WHERE FAMILY
RELATION EXISTS—MEANING OF FAMILY RELATION

*Wells v. Goff*¹

William Claude Allen and Stella Wells came to Glover, Missouri, about 1930. Claude's wife and children lived in a nearby county. Claude and Stella rented a place and lived together for 20 years until Claude's death. There was no evidence of any illicit relationship. During these 20 years they operated variously a saw-mill, planer, store, restaurant and garage. Stella worked in these businesses even to the extent of doing a man's work in the mill and working as a mechanic in the garage. After Claude's death Stella brought suit against his administrator, John Goff, for \$21,900, the alleged reasonable value of her services. The circuit court found the issues generally for the claimant and allowed her \$6,500. Plaintiff and defendant appealed. Judgment reversed and remanded with directions to enter judgment for defendant.

The supreme court held that while usually a claim for services rendered and voluntarily accepted may be sustained on proof of the services,² where, as in this case, a family relation exists, the presumption arises that the services were ren-

14. Cook, *supra* note 5 at 920.

1. 239 S.W. 2d 301 (Mo. 1951).

2. 58 AM. JUR., *Work and Labor*, § 3, p. 512.

dered gratuitously and in order to collect an express or implied in fact contract must be proven³ which admittedly could not be done in this case.

The general requirement of a family relationship is that the parties live in one household under one head and domestic government.⁴ The fact that the parties were related by blood, marriage or adoption will be the determining factor in many cases, and the presumption is stronger or weaker according to the proximity or remoteness of the relationship.⁵ It is not essential that the parties be related by blood, marriage or adoption in order to have a family relationship.⁶ There should be the mutuality of respect, regard and loyalty, affection and conduct that is present in the ordinary home life.⁷ The fact that one of the parties does not participate in the reciprocal duties ordinarily incident to the family relation has been considered in some cases as negating the existence of such a relationship.⁸ When the parties live under a business arrangement it will prima facie exclude a family relationship.⁹

It is to be noted in the principal case that the claimant performed arduous services. Some courts apply the presumption of gratuity only when the services were such as members of a family usually and ordinarily render to each other.¹⁰ Other courts, including Missouri, apply the presumption even though the services were unusual and extraordinary.¹¹

THOMAS DERLETH

CONTRACTS—THIRD PARTY BENEFICIARIES

*Acme Brick Co. v. Hamilton*¹

Plaintiffs, Hamilton and wife, made a contract with defendant builder for the construction of their home. All materials and work were to be provided by defendant builder. Plaintiffs, under this contract, were given the right to select the brick from stocks offered by defendant brick company or the Hope Brick Co. Plaintiffs then visited defendant brick company, and were urged by the office manager to choose from samples of his company's products, and to that end were further

3. 58 AM. JUR., *Work and Labor*, § 11, p. 519.

4. *Birch v. Birch*, 112 Mo. App. 157, 86 S.W. 1106 (1905).

5. *Re Talty's Estate*, 232 Iowa 280, 5 N.W. 2d 584 (1942). *Accord*: *Callahan v. Riggins*, 43 Mo. App. 130 (1891) (where court points out it is living as a family that shows the relationship and not the fact that the parties were brother and sister).

6. *Nelson v. Poorman's Estate*, 215 S.W. 753 (Mo. App. 1919). *Accord*: *Peoples Nat. Bank v. Cohn*, 194 Ark. 1098, 110 S.W. 2d 42 (1937) (where chauffeur held to be member of family).

7. *Farris v. Farris Estate*, 212 S.W. 2d 71 (Mo. App. 1948).

8. *Sarchfield v. Hayes*, 112 N.W. 1100 (Iowa 1907). But *cf. Re Squires Estate*, 168 Iowa 597, 150 N.W. 706 (1915) (where mother-in-law, mentally and physically incapable of rendering service back, held to be member of family).

9. *Lillard v. Willson*, 178 Mo. 145, 77 S.W. 74 (1903). But *cf. Roller v. Montgomery's Estate* 45 S.W. 2d 945 (Mo. App. 1932) (where court held family relationship between brother and sister who had working agreement as to duties, expenses and share in the proceeds of the brother's farm).

10. *Snyder v. Nixon*, 188 Iowa 779, 176 N.W. 808 (1920).

11. *Trantham v. Gullic*, 201 S.W. 2d 522 (Mo. App. 1947).

1. 238 S.W. 2d 658 (Ark. 1951).

urged to examine houses in which defendant brick company's products had been used. Plaintiff's subsequent selection of one of defendant brick company's products was included in their contract with defendant builder. The selection was also included in the contract between builder and brick company, the brick to be furnished to defendant builder. The brick company furnished another type of brick, thereby breaking its contract with defendant builder, a fact not discovered until the brick was installed. The degree in the lower court gave plaintiffs damages for breach of contract against the brick company; plaintiffs' complaint against defendant builder was dismissed. On appeal, the order relieving defendant builder was reversed as plaintiffs had a cause of action against defendant builder and defendant brick company, and a judgment for \$1,300.00 was given against each of the defendants, and a like judgment on defendant builder's cross-complaint against defendant brick company. A rehearing was denied.

Plaintiffs' recovery against defendant brick company seems to be put on the theory that plaintiffs are third party beneficiaries of the contract between defendant builder and defendant brick company. For that reason, the case is of interest in that the beneficiary is given a broader recognition than is usually the case.²

When a supplier contracts to supply materials to a builder or general contractor, for the purpose of enabling the latter to perform his contract with the owner, the owner is usually said to be an incidental beneficiary of the contract between the builder and the supplier, or subcontractor.³ Mr. Corbin reviews the problem of the owner suing a subcontractor for breaking his contract with the general contractor to supply materials to the latter, and concludes: "Such contracts are made to enable the principal contractor to perform; and their performance by the subcontractor does not in itself discharge the principal contractor's duty to the owner with whom he has contracted."⁴ This would appear to be the same view taken by the *Restatement*.⁵ Accordingly, the case is questionable if actually decided on this

2. *RESTATEMENT, CONTRACTS* § 133 (1932); *GRISMORE, CONTRACTS* § 234 (1947).

3. *Carolus v. Arkansas Light and Power Co.*, 164 Ark. 507, 262 S.W. 330 (1924), in which landlord had contracted to supply electric power to his tenant for pumping water. Landlord contracted with defendant for power, the latter contract being breached by defendant. Recovery by tenant against defendant was reversed. *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303 (1927), where contractor promised owner of ship to refit the ship, charterer had no right against the contractor.

Certain cases in admiralty seemingly have extended the doctrine. The owner of cargo has been allowed recovery against the owner of the ship, or crane, the latter having given an express or implied covenant of seaworthiness to the charterer of libellants' cargo.

Davis v. Dittmar, 6 F. 2d 141 (2d Cir. 1925), holding that a creditor may sue in equity, by means of a creditor's bill to reach and apply, a person who has, by contract, given security to a creditor's debtor for the debt. No mention of the doctrine of third party beneficiary was made however. But see *Reliance Marine Transp. & Const. Corp. v. The Tug Skipper*, 89 F. Supp. 272 (D. Conn. 1950), citing *Davis v. Dittmar*, but stating that, "The basis for such a direct recovery might more simply be explained by the third party beneficiary doctrine than the complicated rationale of the *Dittmar* case."

4. 4 *CORBIN, CONTRACTS* § 779D at page 46, § 787 at page 102 (1951).

5. *RESTATEMENT, CONTRACTS* §§ 133 (b), 147 (1932).

basis.⁶ Nothing was to have been supplied by defendant brick company directly to plaintiffs, a fact which previously would have precluded recovery by them.⁷

On the other hand, it may be possible to find a contract between defendant brick company and plaintiffs. Plaintiff "testified that the Acme [defendant brick company] office manager urged him and Mrs. Hamilton [plaintiff] to inspect the houses mentioned—'He insisted that we go to those sites to help us in deciding which brick we wanted.'" It is submitted that urging plaintiffs to examine houses in which the company's products had been used, and urging plaintiff to select the product of his company, instead of a competitor's, could be taken to include a tacit promise by defendant brick company to plaintiffs to deliver a Bralei (defendant builder) the brick selected by plaintiffs.⁸ If this were so, then it would seem unnecessary to base recovery on the third party beneficiary doctrine.

The judgment of the case asserts that defendant builder had a cause of action against defendant brick company, regardless of whether or not the former (promisee) had been required to respond to plaintiffs for break of contract. This is in accord with the law of several jurisdictions.⁹ Some jurisdictions deny recovery by the promisee against the promisor until the former has first paid the beneficiary,

6. The court mentioned that Acme (defendant brick company) cited RESTATEMENT, CONTRACTS § 147 (1932), which employs the following illustration of an incidental beneficiary: "A, an owner of land enters into a contract with B, a contractor, by which B contracts to erect a building containing certain vats. C contracts with B to build the vats according to the specifications in the contract. The vats are installed in the building, but, owing to defective construction, leak and cause harm to A. C is under no contractual duty to A who is only an incidental beneficiary of the contract between B and C, since C's performance is not given or received in discharge of B's duty to A."

7. *Supra*, notes 3, 4, 5 and text to which they are appended.

8. *Wood v. Lucy, Lady Duff-Gordon*, 222 N. Y. 88, 118 N.E. 214 (1917). This would give rise to the question of whether or not a performance or a promise to perform a contractual duty previously undertaken with a third party is sufficient consideration, the opinion of the instant case stating, "Acme [defendant brick company] at all times knew that the result of any selection made would become an integral of the contract it had with Bralei [defendant builder]. . . ." The majority of American jurisdictions deny the validity of these agreements. 1 WILLISTON, CONTRACTS § 131 (Rev. ed. 1936), n. 4, listing cases upholding the minority views. See also *Joseph Lande & Son v. Wellsco Realty*, 131 N.J.L. 191, 34 A. 2d 418 (1943): "While this seems to be the minority view in this country, it is in accordance with the modern trend"; RESTATEMENT, CONTRACTS § 84 (d) (1932); 1 CORBIN, CONTRACTS §§ 176, 179 (1950), quoting from the latter section: "When A is under contract with B to render a specified performance and later makes a new contract with C to render this identical performance, the two contracts are quite separate and independent. The fact that A can discharge them both by a single performance is an interesting fact, but has no bearing upon the validity of the two contracts. This is true whether the two contracts are unilateral or are bilateral, or are one of each."

9. *Stout v. Folder*, 34 Iowa 71 (1871); *Callender v. Edmison*, 8 S.D. 81, 65 N.W. 425 (1895); *Heins v. Byers*, 174 Minn. 350, 219 N.W. 287 (1928); *Rector of Trinity Church v. Higgins*, 48 N. Y. 532 (1872); 4 CORBIN, CONTRACTS § 812 (1951); *Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S.W. 504 (1893). But in Missouri, recovery by either the promisee or the beneficiary is a bar to a recovery by the other. *Rogers v. Gosnell*, 51 Mo. 466 (1875); *Snider v. Adams Express Co.*, 77 Mo. 523 (1883); *Anthony v. The German American Ins. Co.*, 48 Mo. App. 65 (1892). *Accord*, WILLISTON, CONTRACTS § 392 (Rev. ed. 1936).

justifying this on the basis of a principal-surety relationship.¹⁰ But this view disregards the fact that an independent promise to pay obtains, not simply a promise of indemnification.¹¹ However this may be, the *Restatement* denies immediate recovery by the promisee, although no mention is made of any relationship of principal and surety.¹²

ROBERT F. PYATT

CRIMINAL PROCEDURE—ADMISSIBILITY OF CONFESSION MADE WHILE DETAINED
ON CHARGE OF ANOTHER CRIME—THE McNABB RULE

*Carignan v. United States*¹

Appellant Carignan was convicted of murder in the course of an attempt to commit rape upon one Laura Showalter. The deceased was discovered in the morning of August 1, 1949. On September 14th following, an unknown person assaulted and attempted to rape one Christine Norton. A similarity in the circumstances suggested the likelihood that this and the earlier crime had been committed by the same person. On September 16th appellant was brought to the police station and placed in a lineup with several other suspects, and the Norton woman identified him as her assailant. Appellant was at once arrested on the charge of assault to rape Christine Norton, was taken before a magistrate, advised of his rights, and apparently given a preliminary hearing on the charge. No complaint was lodged against him in respect of the Showalter murder, and he was at no time taken before a magistrate for examination or commitment on that charge. However, the police did question him in an endeavor to obtain a statement implicating him in the death of Mrs. Showalter. Between September 16th and 19th appellant was taken two times to the Office of United States Marshal Herring for questioning concerning the murder. During these interviews with the Marshal, appellant requested and was allowed to confer with a priest. On September 19th appellant signed a statement concerning his activities on the day of the murder, but it made no mention of the murder. After some further conversation with the Marshal, appellant added an account of his being with and having violently beaten with his fists the Showalter woman. When he handed the completed statement to the Marshal he was told by the latter that he could still destroy it if he wished. Throughout the period appellant appears to have received kindly treatment so far as concerned his bodily needs; there was no evidence of any assaults, or that any promises were made in the course of the efforts to extract the confession.

At the trial the confession was received over objection of counsel appointed to conduct appellant's defense. On appeal, the Court of Appeals reversed the trial court holding the confession inadmissible under Rule 5, Federal Rules of Criminal

10. 38 HARV. L. REV. 502 (1925); 4 CORBIN, CONTRACTS § 825 (1951). Cf. the same authority § 812.

11. See the first group of cases cited *supra*, note 9.

12. RESTATEMENT, CONTRACTS § 141 (2) (1932).

1. 72 Sup. Ct. 97 (1951), *affirming* 185 F. 2d 954 (9th Cir. 1950).

Procedure,² providing for arraignment immediately after arrest, as construed in *McNabb v. United States*³ and *Upshaw v. United States*.⁴ The court felt that it would not have been impracticable to arraign appellant before a magistrate on the murder charge, of which he was more than suspected; and that since there was abundant time and opportunity to do that, the confession obtained involved the "use by the Government of the fruits of wrongdoing by its officers."⁵ One judge dissented on the ground that these cases were not applicable. He noted that "when Carignan gave his confession he was not being held in disregard of any duty on the police officers. There was no 'illegal detention.' He was being lawfully held after commitment upon a charge of attempted rape. The confession was not 'the fruit of wrongdoing' by anyone."⁶

The Supreme Court granted certiorari, and sustained the reversal,⁷ but on different grounds.⁸ In regard to the admissibility of the confession, the Court reversed the Court of Appeals, adopting, in substance, the opinion of the dissenting judge.

The doctrine of the *McNabb* case has been the subject of much comment. In that case, the Supreme Court held that any confession induced during a violation of 18 U.S.C. §595⁹ could not be used against a defendant whose legal rights were so violated. The Court, in recognizing that Congress did not expressly forbid the use of a confession so procured, said: "But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law."¹⁰ The effect of this decision has been that any confession

2. Federal Rules of Criminal Procedure:

"Rule 5. Proceedings before the Commissioner—

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

3. 318 U. S. 332 (1943).

4. 335 U. S. 410 (1948).

5. *United States v. Mitchell*, 332 U. S. 65 (1944).

6. 185 F. 2d at 962.

7. 72 Sup. Ct. 97 (1951).

8. Refusal to permit defendant to give testimony, in the absence of the jury, as to facts allegedly indicating the involuntary character of the confession held to be reversible error.

9. Incorporated into Rule 5 in 1946.

10. 318 U. S. at 345.

containing none of the usual constitutional infirmities, *viz.* force, duress, or promises of lighter sentence, etc., but one freely and voluntarily given would be inadmissible if secured in violation of this statute.¹¹ And in *Anderson et al. v. United States*,¹² decided the same day, the Court held that confessions given to F.B.I. officers while defendants were being illegally held by state officials would be inadmissible under the doctrine of the *McNabb* case.

The next year in the case of *United States v. Mitchell*,¹³ the doctrine of the *McNabb* case was more fully explained. Here the court held that the confession, to be inadmissible, must have been given during the violation of the statute. A confession given freely and voluntarily within a few minutes of arrest was held not to be inadmissible, even though the defendant was detained in violation of the statute eight days after the arrest and confession. The Supreme Court, in seeking to explain their previous holding, said that the confession must have been induced by the illegal detention of the defendant.

Then in 1948 the Supreme Court decided the case of *Upshaw v. United States*,¹⁴ the case on which the Court of Appeals based their decision in the principal case. In holding that the confession of the defendant, given after being detained for about 30 hours for the purpose of questioning, was inadmissible, the Court held that since the confession was the "fruit of wrongdoing" by the police officers, the confession was inadmissible. The Court recognized that although such may be usual police practice, still, this practice is in violation of Rule 5, and confessions so procured are inadmissible. The true meaning of this holding is perhaps best expressed in the dissenting opinion of Mr. Justice Reed, when he said that the effect was that "a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological. . . .'"¹⁵

It thus appears that the confession must be obtained while the defendant is being held in violation of Rule 5 before the doctrine of the *McNabb* case may be applied to exclude the confession. It must be noted that in the principal case Carignan was not being held in violation of this rule—his detention was entirely legal. He had been properly arraigned on the assault to rape charge before any questioning about the Showalter murder was instigated. Not being able to give bail, he was properly held in police custody; and while in police custody, he could be questioned by the police.¹⁶ It thus seems clear that under the existing interpretations of the

11. *Gros v. United States*, 136 F. 2d 878 (9th Cir. 1943); *United States v. Haupt*, 136 F. 2d 661 (7th Cir. 1943); *United States v. Keegal*, 141 F. 2d 248 (2d Cir. 1944); *Akowskey v. United States*, 158 F. 2d 649 (D. C. 1946); but *cf.* *Boone v. United States*, 164 F. 2d 102 (D. C. 1947).

12. 318 U. S. 350 (1943).

13. 322 U. S. 65 (1944).

14. Note 4, *supra*.

15. 335 U. S. at 422.

16. "The mere fact that a confession was made while in custody of the police does not render it inadmissible." *McNabb v. United States*, 318 U. S. 332, 346 (1943).

McNabb-Upshaw doctrines, the court of appeals was in error in holding that Carignan was being held in illegal detention—and thus the confession given freely by Carignan was not the result of the “fruits of wrongdoing” by the police.

An interesting point is raised in the concurring opinion of Mr. Justice Douglas.¹⁷ After discussing detention without arraignment, the problem dealt with in the *McNabb* case, he states that another police method for securing confessions is to arrest a suspect on “one charge (often a minor one)” for the purpose of questioning him with respect to a wholly different crime. Continuing, he says: “Arraignment for one crime gives some protection. But when it is a pretense or used as a device for breaking the will of the prisoner on long, relentless or repeated questionings, it is abhorrent. . . . We should make illegal such a perversion of a ‘legal’ detention.”¹⁸ It is not clear just what rule Mr. Justice Douglas is proposing. Does he mean that a confession obtained during detention is automatically inadmissible unless the detention is for the particular crime confessed? Or does he mean only that the court should examine the facts in each case to see whether the detention was “a pretense or used as a device for breaking the will of the prisoner on long, relentless or repeated questionings?” The majority seem to think it is the former, and there was a substantial basis for the arrest of the defendant in this case.¹⁹

While many states have statutes comparable to the Federal Rule 5, most of them have expressly refused to follow the doctrine of the *McNabb* case.²⁰ In *Commonwealth v. Mayhew*,²¹ the Kentucky court did indicate, by *dictum*, that it would apply the *McNabb* construction to the Kentucky statute²² if the occasion arose. In that case the court recognized that “holding a prisoner incommunicado for an unreasonable length of time will break his will and weaken his mind, sometimes to the extent that he will confess guilt, though the real facts and circumstances would profess his innocence.”²³ But this *dictum* was apparently overruled in the later case of *Reed v. Commonwealth*,²⁴ when the court said: “Nor do we find that he (defendant) was held in custody for ten days before being taken before a magistrate for hearing. Even had this been shown, the fact would not have vitiated or made inadmissible the statement made by appellant. *Commonwealth v. Mayhew*. . . .”²⁵

Missouri has followed those states which have expressly refused to follow the

17. With whom Mr. Justice Black and Mr. Justice Frankfurter joined.

18. 72 Sup. Ct. at 102.

19. Carignan was subsequently convicted of the assault to rape charge. For comments seemingly pointed at the concurring opinion, see the last paragraph of the majority opinion.

20. *State v. Browning*, 206 Ark. 791, 178 S.W. 2d 77 (1944); *Ingram v. State*, 252 Ala. 497, 42 So. 2d 36 (1949); *Hendrickson v. State*, 229 P. 2d 196 (Okla. 1951) and cases cited therein. In *Roberts v. State*, 50 So. 2d 356 (Miss. 1951), defendant confessed while in legal custody regarding another crime, *Held*, confession admissible.

21. 297 Ky. 172, 178 S.W. 2d 938 (1943).

22. KY. CRIMINAL CODE OF PRACTICE § 46 (Carroll's, 1938).

23. 297 Ky. at 175, 178 S.W. 2d at 930.

24. 312 Ky. 214, 226 S.W. 2d 513 (1949).

25. 312 Ky. at 218, 226 S.W. 2d at 514.

doctrine of the *McNabb* case. Missouri has two statutes embodying principles similar to those in Federal Rule 5.²⁶ In *State v. Menz*,²⁷ (decided before *McNabb v. United States*) the Missouri Supreme Court held that "There is nothing in the proposition that the failure to release a person upon the expiration of twenty hours, . . . a charge not having been filed, constitutes, as a matter of law, such duress as to render any statement or confession made thereafter to any officers presumptively involuntary,"²⁸ and thus inadmissible. Later in *State v. Ellis*,²⁹ in reaffirming the *Menz* case, the court said that the *McNabb* case is not apposite since the Missouri courts have so long followed the rule applied in the *Menz* case.³⁰ The Missouri doctrine seems to be that evidence of the illegal detention is only a factor to be considered by the jury in determining whether the confession was given voluntarily or involuntarily.

JOHN E. YOUNG

TORTS—CIVIL RESPONSIBILITY OF PARENT IN PERMITTING A CHILD UNDER SIXTEEN YEARS OF AGE TO OPERATE THE FAMILY AUTOMOBILE

*Dinger v. Burnham*¹

Plaintiff, sitting in front seat, was being driven to a show by her fifteen year old son in an automobile owned by the plaintiff's husband. The son had obtained a driver's license by falsely stating his age.² The automobile driven by the son collided with a truck operated by the defendant. The lower court sustained the plaintiff's motion for a new trial on the ground that instruction imputing negligence of plaintiff's son to the plaintiff, in the event he was acting as plaintiff's agent, was not supported by any substantial evidence. On appeal by the defendant, the

26. Mo. REV. STAT. § 43.210 (1949): "Person arrested to be dealt with according to law.—Any person arrested by a member of the (highway) patrol shall forthwith be taken by such member before the court or magistrate having jurisdiction of the crime whereof such person so arrested is charged there to be dealt with according to law."

Mo. REV. STAT. § 544.170 (1949); "Twenty hours detention on arrest without warrants—rights—penalty.—All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense; . . ."

27. 341 Mo. 74, 106 S.W. 2d 440 (1937).

28. 341 Mo. at 94, 106 S.W. 2d at 450.

29. 354 Mo. 998, 193 S.W. 2d 31 (1946).

30. Tipton, J., dissented, following doctrine of *McNabb v. United States* applied to § 8360, Mo. REV. STAT. (1939) [now Mo. REV. STAT. § 43.210 (1949)] 1. 354 Mo. at 1007, 193 S.W. 2d at 38.

1. 360 Mo. 465, 228 S.W. 2d 696 (1950).

2. Mo. REV. STAT. § 302.060 (1949) provides in part: "The director of revenue shall not issue any license hereunder: (1) to any person, as an operator, who is under the age of sixteen years." Mo. REV. STAT. § 564.470 (1949) provides in part: "No person under the age of sixteen years shall operate a motor vehicle on the highways of this state."

court held that the negligence of the child was imputable to the plaintiff since there was sufficient evidence to establish an agency relationship and that the plaintiff was negligent in that she breached a duty imposed upon her by statute³ when she allowed her fifteen year old son to operate the automobile. Although the court bases its opinion strongly on agency principles, another ground for the holding is that the plaintiff herself was negligent under the statute.

At common law parents are not responsible for the torts of their children,⁴ and this doctrine generally holds true where parents permit children to use their automobiles, and injuries result thereby. The courts, refusing to classify automobiles as a dangerous instrument per se,⁵ had to find exceptions to the general rule of tort liability in order to hold the parents liable. The Family Purpose Doctrine was one of the developments in the direction of finding responsibility in the parents. This doctrine in effect creates a legal fiction of an agency by declaring that whenever the family car is being used by any member of the family, with the consent of the parent-owner, it is being used in the business of the family, and hence the head of the family is responsible under the laws of agency. This doctrine has been rejected in many jurisdictions including Missouri.⁶

Responsibility on the parent may rest purely on agency principles where a true relationship of master and servant can be established. Therefore, if the child is driving the automobile on the business of the parent, and the child had authority—implied or expressed—to do the acts which caused the injury, then the parent is liable for the child's acts.⁷

A third basis for holding the parent liable for the acts of the child, is on common law negligence principles. Where the parent knew or from the facts should have known that the child was incompetent or reckless, then the parent is liable by virtue of his own negligence in having consented to the child's operation of the auto-

3. Mo. REV. STAT. § 302.250 (1949): "No person shall cause or knowingly permit his child or ward under the age of sixteen years to drive a motor vehicle upon any highway when such minor is not authorized hereunder or in violation of any of the provisions of sections 302.010 to 302.270." Mo. REV. STAT. § 302.260 (1949): "No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized hereunder or in violation of any of the provisions of sections 302.010 to 302.270."

4. *Daily v. Maxwell*, 152 Mo. App. 415, 424, 133 S.W. 351 (1911); 46 C. J., *Parent and Child* § 169, p. 1329.

5. *Eliot v. Harding*, 1107 Ohio St. 501, 505, 140 N.E. 338, 36 A.L.R. 1128 (1923). ("The authorities are quite uniform that an automobile is not such a dangerous agency, and this court is practically committed to that doctrine. The automobile has become an important factor in our present-day civilization, and under modern modes of living, and it cannot be doubted that it has an important place, not only in the business world, but also in the happiness of the people.") *State v. Miller*, 234 S.W. 813 (Mo. 1921); *Michael v. Pulliam*, 215 S.W. 763 (Mo. App. 1919); *Daily v. Maxwell*, *supra* n. 3, 5 AM. JUR., *Automobiles as a Dangerous Instrumentality* § 11, pp. 522-523.

6. *Murphy v. Loeffer*, 327 Mo. 1244, 39 S.W. 2d 550 (1931); *Hays v. Hogan*, 273 Mo. 1, 200 S.W. 286 (1917); *McCall*, *The Family Automobile*, 8 N. C. L. REV. 256 (1930).

7. 46 C.J., *Parent and Child* § 170, pp. 131-1332.

mobile.⁸ However, in many cases it is possible that a child, although under the statutory age required for a driver's license, is a competent operator of an automobile, and hence it would not be difficult to show that the parent could not foresee any risk in allowing the child to drive, especially since the automobile is not classified as a dangerous instrument per se.

This may have been one of the factors which influenced the legislatures of the various states to pass statutes setting age limits below which minors could not obtain operators licenses. Some courts hold that the effect of such a statute is that a child under the prescribed age conclusively does not "possess the requisite care and judgment to run a motor vehicle on the public highways without endangering the lives and limbs of others."⁹ Using this analysis, the courts reason that the parent in permitting a child under the statutory age to operate the automobile, is entrusting the automobile to an incompetent person, and therefore the parent is liable on the basis of his own negligence.¹⁰ However, it also is arguable that such a statute is nothing more than a police regulation, and that it was not the intention of the legislature to make a parent negligent per se when he allowed a minor child to drive his automobile.¹¹

In the principal case, the court seems to follow closely the reasoning of *Roark v. Stone*,¹² when it stated that, although an automobile is not a dangerous instrument per se, it might become such when entrusted into the hands of an incompetent per-

8. *Saunders v. Prue*, 235 Mo. App. 1245, 151 S.W. 2d 478 (1941); *Schultz v. Morrison*, 91 Misc. 248, 154 N. Y. Supp. 257 (Sup. Ct. 1915), *aff'd* 172 App. Div. 940, 156 N. Y. Supp. 1144 (4th Dep't. 1916); *Gulla v. Straus*, 154 Ohio St. 193, 93 N.E. 2d 662 (1950); *Waddle v. Stafford*, 104 Okla. 111, 230 Pac. 855 (1924); *Chamberlain v. Riddle*, 155 Pa. Super 507, 38 A. 2d 521 (1944); 5 AM. JUR., *Automobiles* § 355, p. 696 ("Intrusting the car to a minor child known to be a reckless and incompetent driver constitutes an act of negligence for which the owner is liable."); RESTATEMENT, TORTS § 390 (1934).

9. *Schultz v. Morrison*, *supra* note 7; 3-4 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW § 43, p. 83 (9th ed. 1931) ("Such a statute is legislative determination that a child under the statutory limit of age is incompetent to act as the driver of a motor vehicle.").

10. *Roark v. Stone*, 224 Mo. App. 554, 30 S.W. 2d 647 (1930) (Plaintiff brought suit to recover damages for personal injuries alleged to have been sustained by him in a collision between a truck which the plaintiff was driving and a roadster being driven by the defendant John Stone, minor son of defendant J. L. Stone. The father supplied the son with the car for the purpose of going to school. The court said at page 559: "If the statute prohibiting the use of motor vehicles by a minor under sixteen years of age is to have any effect whatever, the father who knowingly permits such violation of the law, and whose negligence in so doing makes it possible for the child to cause the injury, must be held on account of such negligent act."); *Eliot v. Harding*, *supra* note 5, *cf.* *Laubach v. Colley*, 283 Pa. 366, 129 Atl. 88 (1925).

11. In Comment, 44 U. OF MO. BULL. L. SER. 57 (1931), in commenting on the decision in *Roark v. Stone*, *supra* n. 10, the author states at page 65: "... there is nothing in the wording of the statute interpreted in the instant case, nor in the application of such a statute to existing common law principles in Missouri to show that the legislature intended to establish negligence on the part of the parent who owns an automobile, merely from the fact that he permitted his minor child to drive the automobile."

12. *Supra*. n. 10.

son and since the legislature in Section 564.470¹³ in effect declared "that one under the age of sixteen (16) years conclusively does not possess the requisite care and judgment to operate a motor vehicle on the public highway without endangering life and property,"¹⁴ the parent may become liable by reason of entrusting the automobile to the child under sixteen.

The supreme court in the principal case may have been aided in its reasoning, however, by Sections 302.250 and 302.260¹⁵ (enacted in 1937) which were not in effect at the time *Roark v. Stone*¹⁶ was decided. It is not clear though, whether the court makes as much use of this statute as it might have. In construing a statute similar to 302.250,¹⁷ the Supreme Court of Nebraska stated, in *Walker v. Klopp*,¹⁸ that the purpose of such a statute is for the protection of the public generally.¹⁹ This is a valid interpretation of the statute and, if so accepted, any breach of such a statute would constitute negligence per se.²⁰ The Nebraska court states: "It has been frequently and most universally held by the courts that the violation of a statute . . . , that provides that something shall be done, or shall not be done for the benefit of individuals, or for the benefit and protection of individuals and the public generally, is negligence *per se* and subjects the violator of the law to liability for damages caused by a violation of such statute or ordinance."²¹ Thus it would seem in the principal case that the violation of the statute by the plaintiff would make the plaintiff negligent per se, and that it was not necessary for the court to reason that the plaintiff was responsible because the automobile was a dangerous

13. *Supra* n. 2.

14. *Supra* n. 1, at 469.

15. *Supra* n. 3.

16. *Supra* n. 10.

16. *Supra* n. 10.

17. NEB. REV. STAT. § 3048 (1913) provides in part: "It shall be unlawful for any person under sixteen years of age . . . to operate a motor vehicle, and any owner, dealer, or manufacturer of motor vehicles who permits a person under sixteen years of age . . . to operate a motor vehicle shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided for violation of the provision of this article."

18. 99 Neb. 794, 57 N.W. 962 (1916).

19. *Id.* at 799, 57 N.W. at 964 ("The clear and unmistakable purpose of the legislature in enacting the Nebraska Statute [*Supra*, n. 18] was to protect persons and property from injury and damage that experience had shown were more likely to be occasioned by the driving of motor vehicles on the public highways by minors under sixteen years of age, than would be occasioned by the driving of motor vehicles by older persons of more mature judgment; and when a person willfully permits his minor child, under the age of sixteen years, to drive his automobile upon the public highways, in direct violation of this statute, such permission and such violation of the statute constitutes in him such negligence as is by direct sequence of events the proximate cause of any damage that may be sustained by another to his person or property by the driving of such automobile by such minor, when the other elements of actionable negligence are established."); see *e.g.*, *Burrell v. Horchemx*, 117 Kan. 675, 232 Pac. 1042 (1925); *Watson v. Osborn*, 81 N.E. 2d 402 (Ohio App. 1948).

20. *Brannock v. Elmore*, 114 Mo. 56, 21 S.W. 451 (1893); *Kuba v. Nagel*, 124 S.W. 2d 597 (Mo. App. 1939); *Swigart v. Lush*, 196 Mo. App. 471, 192 S.W. 138 (1917); *Contra: Chamberlain v. Riddle*, *supra* n. 8.

21. *Walker v. Klopp*, *supra* n. 19, at 797.

instrument when in the hands of an incompetent person. Perhaps the supreme court was deciding that the plaintiff was negligent as a matter of law when it stated: "She breached a duty the law imposed upon her for the protection of the public when she permitted him to operate the automobile for the purpose [taking plaintiff to the show] without asserting her parental authority to prevent it." The same conclusion is reached in other jurisdictions with similar statutes.²²

This case is different in that it is the parent who is bringing the action, whereas in the other cases it is against the parent whom the action is being brought, for the injury sustained because of the negligence of the child. However, there would seem to be no difference on legal principle. Furthermore, the parent's presence in the automobile in either situation only makes her permission to the child to drive in violation of the statute indisputable.²³

BERNARD SILVERMAN

TORTS—RES IPSA LOQUITUR—DEFECTIVE DOOR OF RAILROAD FREIGHT CAR

*Jones v. Thompson*¹

Plaintiff sustained personal injuries while endeavoring to open the door of a freight car in defendant's freight yard to remove a shipment of lubricating oil consigned to his employer. The same car also contained lubricating oil consigned to a consignee at another station. When plaintiff arrived at defendant's yard he noticed that the door to the car in question was in a damaged condition. Plaintiff reported this to defendant's freight agent, but the latter told him he had checked the car and that it was "all right to go ahead and unload it." It appeared from the evidence that the door was unsupported at the bottom, and hung only from the top track. While the door was being opened by plaintiff, it became disengaged from the top track, fell upon plaintiff's foot and then toppled over on him. Plaintiff recovered a verdict for \$25,000. Defendant's motion to set aside the verdict (on grounds of contributory negligence) was sustained. On appeal by the plaintiff the verdict in his favor was ordered reinstated. Any question of contributory negligence was held for the jury.

The principal question of the case was whether the defendant was in exclusive control or had an exclusive right of control of the defective car at the time plaintiff sustained his injury. The court said that as a general rule a carrier is primarily

22. *E.g.*, *Rush v. McDonnell*, 214 Ala. 47, 106 So. 175 (1925); *Paschall v. Sharp*, 215 Ala. 304, 110 So. 387 (1926); *Walker v. Klopp*, *supra* n. 19; *Wery v. Seff*, 136 Ohio St. 307, 25 N.E. 2d 692 (1940); *Miller v. Semler*, 137 Ore. 610, 2 P. 2d 233 (1931) *rehearing denied* 137 Ore. 610, 3 P. 2d 987 (1931); *Smith v. Nealey*, 162 Wash. 160, 298 Pac. 345 (1931); 3-4 *HUDDY*, *supra* n. 9, at 83; *accord*, *Kenyon v. Hathaway*, 274 Mass. 47, 174 N.E. 463, 73 A.L.R. 156 (1931); *Hoke v. Atlantic Greyhound Corporation*, 226 N.C. 692, 40 S.E. 2d 345 (1946); *Wilcox v. Wunderlich*, 73 Utah 1, 272 Pac. 207 (1928). *Contra*: *Hertz Drive-Ur-Self System of Colorado v. Hendrickson*, 109 Colo. 1, 121 P. 2d 483 (1942).

23. Some states have passed additional legislation making the owner responsible for injuries negligently caused by anyone operating the automobile with his consent. N. Y. Vehicle and Traffic Law § 59; Ia. Code §321.493 (1950).

1. 360 Mo. 285, 228 S.W. 2d 673 (1950).

bound properly to unload freight. But an exception obtains in the case of carload shipments of bulky freight which the carrier is not required to *unload* but may deliver at a customary sidetrack to be unloaded by the consignee. However, this exception did not apply as the railroad had a duty to separate the mingled shipments and unload them.

It is the duty of a railroad to exercise reasonable care in inspecting cars, before delivering them to a consignee, to ascertain whether the cars are in a sufficiently safe condition for unloading them.² The fact that the car may be the property of another corporation is immaterial.³ Where the injury is caused by a defective door, some of the cases have been brought on the theory of ordinary negligence, without applying the doctrine of *res ipsa loquitur*.⁴ The above is only applicable to patent defects, for the carrier is not liable for injuries resulting from defects that are latent.⁵

Basic to the doctrine of *res ipsa loquitur*, on which the instant case was based, the instrumentality causing the injury must be under the exclusive control or right of control of the defendant.⁶ But if the instrumentality, although the property of the defendant, is under the temporary control of the plaintiff at the time of the injury, the doctrine of *res ipsa loquitur* is not applicable.⁷

The instant case seemingly turned upon the fact that plaintiff did not have exclusive control or right of control at the time of the injury and that the defendant did, due to the fact that a *carload* shipment was not involved, but rather a shipment destined for several consignees, of which plaintiff's employer was but one. Had a carload shipment been involved, thus giving plaintiff's employer a right of control, the court indicated that the doctrine of *res ipsa loquitur* would not have been applicable. The distinction seems sound.⁸

ROBERT F. PYATT

2. *Sykes v. St. L. & S. F. R.R.*, 178 Mo. 693, 77 S.W. 723 (1903), stating by way of dictum, "it is the duty of the ultimate carrier, before delivering it, to examine it and ascertain whether it is in such a state of repair that the servants of the consignee, while exercising reasonable care themselves, can enter upon it with reasonable safety for the purpose of unloading it, and, if it is not in such a condition, it is the duty of the railroad to make the necessary repairs, or to notify the consignee of the unsafe condition of the car, so that the consignee can warn his servants before they enter upon it."

3. *Ladd v. N. Y., N.H. & H. R.R.*, 193 Mass. 359, 79 N.E. 742 (1907).

4. *Griffin v. Payne*, 95 N. J.L. 490, 113 Atl. 247 (1921); *Ladd v. N. Y., N. H. & H. R.R.*, *supra* n. 3; *Corbett v. N. Y. C. & H. R.R.*, 215 Mass. 435, 102 N.E. 648 (1913).

5. 126 A.L.R. 1095 at 1100.

6. PROSSER, TORTS § 43 (1941).

7. *Courtney v. N. Y., N. H. & H. R.R.*, 213 Fed. 388 (D. Conn. 1914). But *res ipsa loquitur* may be properly applied where plaintiff's control was not a causative factor in the injury. 169 A.L.R. 953 at 958 *et seq.*; *Whitaker v. Pitcairn*, 351 Mo. 848, 174 S.W. 2d 163 (1943).

8. Other cases suggest the problem. In *Martin v. Southern Pacific*, 46 F. Supp. 954 (S.D. Cal. 1942), plaintiff was an employee of a consignee of a *carload* shipment of celotex. He was injured while he and fellow employees were endeavoring to open an allegedly defective door of a car delivered by defendant. The aid of a motorized carrier was invoked in forcing the door. Plaintiff's case was predicated on the theory of *res ipsa loquitur*. It was held that since defendant did not have

WILLS—CONTRACT NOT TO REVOKE A WILL—DIRECT DEVISE OF
LAND TO AN UNINCORPORATED ASSOCIATION

*Glidewell v. Glidewell*¹

B. L. Willis and his wife, Huldah Willis, each owning property, executed a joint will in 1923 wherein each devised all of his property to the survivor. The document continued, "And it is our will that if upon the death of the survivor of us, there shall be any property remaining undisposed of, we give, devise, and bequeath the same to the church of the Nazarene, to have and to hold the same absolutely." B. L., who owned the land in question, died in 1927 and in 1946 Huldah executed a new will, devising land to her brother and sister to the exclusion of the church and her other relatives. The trial court held that there was insufficient evidence to establish a contract not to revoke the 1923 will and that, under it, Huldah received the fee to all lands owned by B. L. at his death.

The Missouri Supreme Court held (1) that under the joint will Huldah received only a life estate with power of disposal of the fee during her lifetime, remainder to the church upon Huldah's death in the event she had not exercised the power; (2) that because there was no evidence of a contract not to revoke, Huldah could revoke the 1923 will; (3) though the church as a voluntary religious unincorporated association could not acquire or hold title to the property, the devise of the remainder created a valid trust for its benefit.

Where land is conveyed or devised in fee simple, a limitation over of so much of the property as is not disposed of is wholly void, irrespective of the intention of the grantor or testator. However, if a conveyance or devise is construed to give the

exclusive control at the time of the accident; that there was a reasonable inspection which revealed no defect; and that since the defect may well have been partially caused by the manner of opening the door, the doctrine of *res ipsa loquitur* was not applicable. In *Franklin v. Illinois Central R.R.*, 13 So. 2d 125 (La. 1943), plaintiff was an employee of an independent contractor engaged to unload box cars. He was injured as a door of a car became detached from its fastenings and fell upon him. The case was brought under the *res ipsa loquitur* doctrine. The court admitted that the doctrine might be applied, but since defendant proved due care on its part, any presumption was rebutted. The question of right of control was not discussed, since plaintiff's employer did have temporary control of the car. Thus our basic element of *res ipsa loquitur* was lacking. In *Turner v. Missouri-Kansas-Texas R.R.*, 346 Mo. 28, 142 S.W. 2d 455 (1940), while plaintiff was lawfully at defendant's station he was struck by an open door of a passing refrigerator car. The court held that *res ipsa loquitur* was applicable. Of course, these facts could hardly raise a dispute as to right of control. In *Tateman v. Chicago, Rock Island & Pacific Ry.*, 96 Mo. App. 448, 70 S.W. 514 (1902), plaintiff, an employee of a grocery company to which had been consigned a carload of goods, applied for an order from defendants agent to permit him to open the car to inspect the contents. The order was granted. Plaintiff proceeded to open the car door when it fell from its place and injured him. It was held that a case of *res ipsa loquitur* could properly be based upon these facts. But it will be observed that while a *carload* shipment was involved, a fact of importance as indicated by the instant case, the defendant still had control of the car, as plaintiff entered to inspect, not to unload.

1. 360 Mo. 713, 230 S.W. 2d 752 (1950).

first taker only a life estate with power to convey a fee, a limitation over in default of exercise of the power is valid in most jurisdictions.²

It is well settled in Missouri³ as elsewhere⁴ that a contract to refrain from making a will is valid. Often statements are made that such a contract makes the will irrevocable. Strictly speaking, such statements are incorrect. Wills are revocable during the life of the testator and a contract to dispose of one's property in a particular way does not make them any less so.⁵ If a will is revoked in violation of such a contract, the usual remedies are an action for money damages against the estate of the promisor or a suit to compel the heirs or next of kin of the promisor to hold the property upon constructive trust for the beneficiary of the contract.⁶

It is generally stated that an agreement to be effective as a contract to make or refrain from revoking a will must be a definite, fair, and just agreement, based upon sufficient consideration, and proved by clear, cogent, and convincing direct or circumstantial evidence.⁷ Mutual separate wills are not alone sufficient evidence of such a contract.⁸ The case noted holds that the mere making of a joint will is not alone sufficient evidence to establish a contract not to revoke.⁹

A conveyance or devise of land to a trustee for the use of a voluntary unincorporated association creates a valid trust,¹⁰ in the absence of some prohibitory statute.¹¹ The validity and effect of a conveyance or devise of land directly to such an association is more uncertain.¹² Courts in jurisdictions which invalidate such gifts usually do so on one of several theories, all of which spring from the hypothesis that an unincorporated voluntary association is not a legal entity. Some courts reason that because the unincorporated association is not a legal entity capable of

2. For discussion of this problem see Hudson, *Executory Limitations of Property in Missouri*, 11 U. OF MO. BULL. L. SER. 3 (1916); Comment, *supra* p. 177; Note, 17 A.L.R. 2d 7 (1951).

3. Bower v. Daniels, 198 Mo. 289, 95 S.W. 347 (1906).

4. E.g., Clement v. Jones, 166 Ga. 738, 144 S.E. 319 (1928); Neipp v. Toolen, 313 Ill. App. 28, 38 N.E. 2d 980 (1942); Menke v. Duwe, 117 Kan. 207, 230 Pac. 1065 (1924); Edson v. Parsons, 155 N. Y. 555, 50 N.E. 265 (1898); *In re Engle's Estate*, 129 Ore. 77, 276 Pac. 270 (1929); Beveridge v. Bailey, 53 S.D. 984, 220 N.W. 462 (1928); Canada v. Ihmsen, 33 Wyo. 439, 240 Pac. 927 (1925).

5. See e.g., Crampton v. Osborn, 356 Mo. 125, 201 S.W. 2d 336, 342 (1947); *In re Crawley's Estate*, 136 Pa. 628, 20 Atl. 567, 568 (1890); ATKINSON, WILLS 170 (1937).

6. E.g., Keasey v. Engles, 259 Mich. 178, 242 N.W. 878 (1932). See e.g., Clement v. Jones, 166 Ga. 738, 743, 144 S.E. 319, 322 (1928); 69 C.J. 1300, 1302.

7. Stewart v. Shelton, 356 Mo. 258, 201 S.W. 2d 395 (1947); 69 C.J. 1300; Compare Edson v. Parson, 155 N. Y. 555, 50 N.E. 265 (1898) with Plemmons v. Pemberton, 346 Mo. 45, 139 S.W. 2d 910 (1940) and *In re McGinley's Estate*, 251 Pa. 438 101 Atl. 807 (1917). The contract, however, must be an existing contract and not estoppel.

8. Beveridge v. Bailey, 53 S.D. 98, 220 N.W. 462 (1928); Canada v. Ihmsen, 33 Wyo. 439, 240 Pac. 927, 929 (1925); ATKINSON, WILLS 178 (1937).

9. Accord: Wanger v. Marr, 257 Mo. 482, 165 S.W. 1027 (1914).

10. Cf. *McCartee v. Orphans Asylum Society*, 9 Cow. 437, 18 Am. Dec. 516, 518, 540 (N. Y. 1827).

11. See *Executors of Burr v. Smith*, 7 Vt. 241, 276, 29 Am. Dec. 154 (1835).

12. E.g., *Greene v. Dennis*, 6 Conn. 293 (1826); *Cobb v. Denton*, 65 Tenn. (6 Baxt.) 235 (1873).

taking and holding legal title, no title passes by the conveyance to it.¹³ Other courts state that, because no trustee is named, to raise a trust would be exercising the prerogative powers exercised by the Chancellor under the sign manual of the King, which Equity in the United States does not possess.¹⁴ Still other courts reason that the conveyance cannot be given effect because the association was intended to be the beneficiary, and as a beneficiary having no legal entity it is incapable of coming into court and enforcing the provisions of the trust.¹⁵

The modern tendency, however, is to ignore the straight logical arguments outlined above and give effect to direct gifts to unincorporated charitable association as trusts.¹⁶ The courts find a basis of validating these gifts in carrying out the "dominant intent" of the donor;¹⁷ in the policy of Equity favoring charitable gifts because the objects of charities are "those that must meet with favor in every Christian and civilized community";¹⁸ and in the policy of not permitting a trust to fail for want of a trustee.¹⁹ A few courts validate these gifts on the basis that the associations have at least a quasi-corporate existence so as to enable them to receive and hold such gifts.²⁰

Gifts of personalty made directly to charitable unincorporated associations are more readily upheld than those of realty.²¹ The different consideration given to direct gifts of personalty and realty may be based upon a statute;²² but more often it is based on the strict logical theory that an unincorporated association, having no legal existence, can have no legal perpetuity and therefore can not hold a fee title in land.²³ Some courts, while adhering to this theory, enforce gifts of land by selling the land and substituting the proceeds of the sale for the land as the trust corpus, which is then enforced as a gift of personalty.²⁴ Several jurisdictions, however, enforce gifts of both realty and personalty on an equal basis, even

13. *Greene v. Dennis*, 6 Conn. 293, 298 (1826); *Owens v. Missionary Society of the M.E. Church*, 14 N. Y. (4 Kernan) 380, 67 Am. Dec. 160, 178-9 (1856).

14. *Green v. Allen*, 1 Swan 170, 204 (Tenn. 1844).

15. *Church Extension of the M.E. Church v. Smith*, 56 Md. 362, 398 (1881); see *McLean v. Church of God*, 254 Ala. 134, 135, 47 So. 2d 257 (1950).

16. *In re McDoles Estate*, 215 Cal. 334, 10 P. 2d 75 (1932); *Meeker v. Lawrence*, 203 Iowa 409, 212 N.W. 698 (1927); *Barnhart v. Bower*, 143 Kan. 866, 57 P. 2d 60 (1936); *Kinney v. Kinney's Executor*, 86 Ky. 610, 6 S.W. 593 (1888); *Schneider v. Kloppe*, 270 Mo. 389, 193 S.W. 834 (1916); *Kirkpatrick v. Rodgers*, 41 N.C. (6 Ired. Eq.) 130 (1849); *In re Lawless' Will*, 87 N. Y. S. 2d 386, 395 (Surr. Ct. 1949); *In re Lawsons' Estate*, 264 Pa. 77, 82, 107 Atl. 376, 377 (1919); *Nashville Trust Co. v. Johnson*, 236 S.W. 2d 100 (Tenn. 1950).

17. *E.g.*, *In re McDoles' Estate*, 215 Cal. 334, 10 P. 2d 75, 77 (1932). But see *Greene v. Dennis*, 6 Conn. 293, 299 (1826) (intent of grantor must not be repugnant to laws of the state).

18. *E.g.*, *Dickson v. Montgomery*, 1 Swan 348, 362 (Tenn. 1851).

19. *E.g.*, *Washburn v. Sewell*, 50 Mass. 280, 282 (1845).

20. *Nashville Trust Co. v. Johnson*, 236 S.W. 2d 100 (Tenn. 1950).

21. See *McLean v. Church of God*, 254 Ala. 134, 135, 47 So. 2d 257 (1950).

22. *Cf.*, *Laird v. Bass*, 50 Tex. 412 (1878).

23. *E.g.*, *Stone v. Griffin*, 3 Vt. 400 (1831). But *cf.* *Executors of Burr v. Smith*, 7 Vt. 241, 29 Am. Dec. 154 (1835).

24. See *Executors of Burr v. Smith*, 7 Vt. 241, 309, 29 Am. Dec. 154 (1835).

though adhering to the view that the unincorporated association is incapable of holding legal title to land.²⁵

In Missouri it has long been settled that a direct gift of realty or personalty to an unincorporated charitable association will be upheld.²⁶ In *Schmidt v. Hess*²⁷ the grantor conveyed by deed to the "Lutheran Church" property for a burial ground. The plaintiffs were trustees of the Evangelical Lutheran Church seeking to have title to the property vested in them. The court found that the donor intended the church to have the use of the property and decreed that title to it vest in trustees for the church. Since 1865 it has been settled that trustees may hold title to land for unincorporated religious associations.²⁸ When there are no trustees of an association, one or more of its members may sue for and on behalf of the others,²⁹ and upon obtaining a judgment either the trial court or the members of the association in its "sovereign" capacity may appoint the trustee to receive and hold the property.³⁰ The case noted is consistent on this question with the Missouri precedents.

ROBERT P. KELLY

25. E.g., *In re McDoles Estate*, 215 Cal. 334, 10 P. 2d 75 (1932); *Schneider v. Kloepple*, 270 Mo. 389, 193 S.W. 334 (1916).

26. *Schmidt v. Hess*, 60 Mo. 591 (1875); *Lily v. Tobbein*, 103 Mo. 477 (1890); *Barkley v. Donnelly*, 112 Mo. 561 (1892); *Society of the Helpers of the Holy Souls v. Law*, 267 Mo. 667, 186 S.W. 718 (1916); *Schneider v. Kloepple*, 270 Mo. 389, 193 S.W. 834 (1916); *Harger v. Barrett*, 319 Mo. 633, 5 S.W. 2d 1100 (1928). But see *T. A. Miller Lumber Co. v. Oliver*, 65 Mo. App. 435, 439 (1896).

27. 60 Mo. 591 (1875).

28. Mo. CONST. Art. I, §§ 12, 13 (1865) provided for the first time that church property could be held by trustees.

29. *Lily v. Tobbein*, 103 Mo. 477, 488 (1890).

30. *Harger v. Barrett*, 319 Mo. 633, 642, 5 S.W. 2d 1100, 1102 (1928).